IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

THURSDAY, THE 27TH SEPTEMBER 2007 / 5TH ASWINA 1929

CMA.No. 48 of 2002()

AS.75/2000 of SUB COURT,KOTTARAKKARA
OS.576/1996 of MUNSIFF COURT, KOTTARAKKARA
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APPELLANT: RESPONDENTS/DEFENDANTS.
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1. SEKHARA PILLAI, ALIAS CHANDRASEKHARA PILLAI, S/O. NARAYANA PILLAI, AGED 54 YERARS, BIJU MANDIRAM, THAMARAKUDY MURI, MYLOM VILLAGE, KOTTARAKKARA TALUK.

2. INDIRABHAI AMMA, D/O. KAMALAKSHI AMMA, AGED 50 YEARS, OF -DO- -DO-

BY ADV. SRI.B.KRISHNA MANI

RESPONDENTS: APPELLANTS/PLAINTIFFS.
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1. DANIEL, S/O. MATHAI, AGED 44 YEARS, PARAMBIL THEKKEKKARA VEEDU, MYLOM MURI, MYLOM VILLAGE, KOTTARAKKARA TALUK.

2. KUNJELI, D/O. ANNA, AGED 53 YEARS, OF -DO- -DO-

BY ADV. SRI.REJI MATHEW KAVALAYIL

THIS CIVIL MISC. APPEAL HAVING BEEN FINALLY HEARD ON 27/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. PADMANABHAN NAIR, J.

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C.M.A. NO. 48 OF 2002

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Dated this the 27th day of September, 2007

J U D G M E N T

Defendants in O.S. No.575 of 1996 on the file of the Munsiff's Court, Kottarakkara, are the appellants. Appeal is filed against the order of remand passed by the Sub Court, Kottarakkara by which the lower appellate court set aside the decree and judgment passed by the trial court and remanded the case for fresh disposal in accordance with law.

2. Material averments in the plaint were as follows: Suit property having an extent of 59 cents comprised in Sy.No.437/4 of Mylom Village originally belonged to one Joseph. He along with his children executed a settlement deed on 26.10.1957. Suit property was included in 'F' Schedule of the settlement deed and allotted in favour of Elia Anna. Plaintiffs are her children. After the death of Elia Anna, the suit property devolved upon them and they had planted the property with rubber trees. Defendants are having property on the north of the suit property. They demanded the suit property, but the plaintiffs were not willing to gave up the

same. Then the defendants tried to trespass in to the suit after destroying the boundaries. Hence the plaintiffs filed the suit for injunction.

3. First defendant filed a written statement with the following contentions: The suit was not maintainable. Plaint description is not correct. With the description given in the plaint, the suit property cannot be identified. The averment that the plaintiffs have effected rubber plantation in the suit property was not correct. Defendants have no property on the south of the property belonging to the plaintiffs. The averment that the defendants tried to trespass into the suit property was denied. Second defendant also filed a written statement raising more or less similar contentions which were raised by the first defendant.

4. A Commissioner was deputed to identify the suit property, who filed Exhibits C1 mahazar, C2 report and C3 plan. Trial court took a view that plaintiffs have disowned the description of the suit property in Exhibits C2 and C3 and hence dismissed the suit. Challenging the dismissal of the suit, plaintiffs filed A.S. No.75 of 2000. Lower appellate court

found that it was a fit case in which an opportunity should be granted to the plaintiffs to amend the plaint schedule. The judgment and decree passed by the trial court were set aside and the suit was remanded for fresh disposal. Challenging that order of remand, defendants have filed this Civil Miscellaneous Appeal.

5. Plaintiffs claimed title and possession under Exhibit A1 settlement deed. A reading of the document shows that the suit property along with other properties belonged to one Joseph, who was the grand father of the plaintiffs. In Exhibit A1 it is stated that some of the properties were purchased by the donor in the year 1093 M.E. as per document No.2681/1093 M.E. It is also stated that some of the properties were Government land and some properties were obtained on Kuthakapattom. It is further stated that Joseph gifted certain properties as per document No.4157/1957, but those properties were also included in Exhibit A1. It is true that description of property gifted is stated as 59 cents of land in 2.21 acres of land comprised in Sy.No.437/4. Boundaries of that property were described as follows:

"East : Pattazhivaka Purayidom

South : Kuthakapattom Purayidom.

West : Property owned by Karukuknnil

North : Property owned by Asari (Carpenter)"

At the instance of the plaintiffs, a Commissioner was deputed. Property was measured and located with the help of a Surveyor. According to the Commissioner though in the plaint the suit property was described as 59 cents, actually the extent available at the spot was only 53.10 cents which was shown as 'FGHI' in Exhibit C3 plan. Commissioner reported that that property is included in Block No.15 in R.S.No.395/6. But the Commissioner further stated that boundaries stated in Exhibit A1 are not seen in the spot. She had also reported that the boundaries on the date of inspection were as follows:

"East Property owned by Puthuvalathumukalil Kunjeli

South Pathway

West Property owned by Karikunni Pankajakshi

North Properties owned by defendants"

It is reported that on the south of the pathway properties owned by one Narayana Pillai are situated. The Commissioner did not make any attempt as to whether the properties which she had reported as belonging to defendants were the properties owned by Asari. There is every possibility of change of ownership of properties. According to me the Commissioner ought to have made an attempt to locate the entire 2.21 acres of land and then locate the suit property, i.e., 59 cents, claimed by the plaintiffs with the help of various records and also re-survey records. Learned counsel for the defendants submitted that even Exhibit A1 document produced is not complete. The last 4 pages of the document is seen torn of and incomplete. The trial court ought to have asked for production of the certified copy of the document itself. It is to be noted that western boundary is known as Karikkunni. It appears that it is a house name. The Commissioner had reported that at present the property on West is owned by one Smt. Pankajakshi of Karikunni. Likewise, in the plaint, eastern boundary of the suit property is described as property owned by Pattazhivaka Purayidom. In

this connection it is to be noted that a Commissioner was deputed during the pendency of the appeal also. Plaintiffs filed an application to depute a Commissioner pointing out that the defendants were committing waste in the suit property and they cut and removed two teak trees. The Commissioner after inspecting the suit property reported that there is a PWD road on the east of the suit property and on the immediate west of the road property owned by Pattazhi is situated. It is also reported that the property lying on the eastern boundary of the suit property is owned by Kunjeli, daughter of Maria of Puthupanathil Mukalil. She also reported that the property owned by Kunjeli is comprised in R.S. No.382/2 where as the suit property is comprised in R.S. No.395/6.

6. Merely because the name of the owner of adjacent properties changes it is not possible to hold that boundaries mentioned are something else. So, prima facie, the reasoning of the Commissioner that boundaries described in the plaint are not seen in the place does not appear to be correct. In a suit for injunction the court is only concerned with the

possession of property. To prove the possession, plaintiffs have applied for a commission and the Commissioner has filed a report. If the trial court was not satisfied with the report, it should have set aside that report and appointed another Commissioner. Of course, plaintiffs could have also produced prior title deeds. Defendants did not also produce title deeds on the ground that those documents were mortgaged with the Bank. Even then they could have produced certified copies of the same. If the defendants have failed to produce the same, the plaintiffs could have obtained and produced the same before the trial court to find out what exactly was the description of the southern boundary of defendants' property. For that purpose, the lower appellate court remanded the suit. It was not for filling up a lacuna as argued by the counsel for the appellants-defendants. It was only to rectify the mistake committed by the trial court while appreciating the evidence. So I do not find any ground to interfere with the order of remand passed by the lower appellate court. It is open to the plaintiffs to apply to depute another Commissioner to locate the suit property with the help of competent Surveyor, if so

advised. The Civil Miscellaneous Appeal is without any merit and the same is only to be dismissed.

7. In the result, the Civil Miscellaneous Appeal is dismissed.

Civil Miscellaneous Petition No.1071 of 2002 shall stand dismissed.

K. PADMANABHAN NAIR, JUDGE.

vsv

K. PADMANABHAN NAIR, J.

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J U D G M E N T

27TH SEPTEMBER, 2007